

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

Jack Schuster,

Plaintiff,

v.

CBE Group, Inc.,

Defendant.

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Civil Action No.: 14-CV-00080(WSS)

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiff Jack Schuster (“Schuster”) submits his Response in Opposition to the Motion to Dismiss by Defendant CBE Group, Inc. (“CBE”), and respectfully requests that the motion be denied.

Plaintiff has filed his First Amended Complaint as of right pursuant to Fed. R. Civ. P. 15(a)(1)(B). The filing of an amended complaint renders the motion to dismiss moot. *Thomas v. Duetsche Bank Nat. Trust Co.*, 2013 WL 673988, *1 (N.D. Tex., Jan. 21, 2013) *report and recommendation adopted*, 2013 WL 673983 (N.D. Tex., Feb. 25, 2013) (amended pleading supersedes original complaint making pending motion to dismiss moot); *see also Alvarez v. The GEO Grp., Inc.*, 2010 WL 3430522, *1 (W.D. Tex., Aug. 30, 2010).

Moreover, the motion to dismiss should be denied on substantive grounds. The Telephone Consumer Protection Act (“TCPA”) makes prohibits “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii).

“[T]o plead a TCPA claim, Plaintiff needs only to allege two things: (1) that a cellular phone was called; (2) via an ATDS or prerecorded voice.” *Mashiri v. Ocwen Loan Servicing, LLC*, 2013 WL 5797584, *5 (S.D. Cal., Oct. 28, 2013); *Robbins v. Coca-Cola-Co.*, 2013 WL 2252646, *2 (S.D. Cal., May 22, 2013); *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 2013 WL 364550 (W.D. Mich., July 12, 2013).

A plaintiff is not required to provide their cellular telephone in the complaint. *See, e.g., Manfred v. Bennett Law, PLLC*, 2012 WL 6102071, at fn. 2 (S.D. Fla., Dec. 7, 2012). In his amended complaint, Plaintiff has provided a partially redacted telephone number and has identified it as his number. There is no requirement, in the TCPA or at common law, that Plaintiff place his entire number in a public pleading.

Further, the date and time of each unlawful call is *not* an element of the claim nor is the claim required to be pled with such particularity. “[T]he language of the TCPA makes no reference to the time, content, sequence, or volume of calls or messages as a prerequisite to liability; rather, the wording of the statute is expansive and content neutral.” *Robbins*, 2013 WL 2252646 at *2 (denying motion to dismiss where defendant asserted date/time of unlawful calls must be alleged); *see also Robinson v. Midland Funding, LLC*, 2011 WL 1434919, *3 (S.D. Cal., Apr. 13, 2011) (“notice pleading standards do not require a plaintiff to allege details at the pleading stage about the time and context of every telephone call.”) (internal quotation omitted).

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant’s Motion to Dismiss.

Dated: May 19, 2014

Respectfully submitted,

By /s/ Sergei Lemberg

Sergei Lemberg, *Attorney-in-Charge*

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on May 19, 2014, a true and correct copy of the foregoing Response in Opposition to Motion to Dismiss was filed with the Clerk of Court for the United States District Court for the Western District of Texas using the CM/ECF system, which sent notice of such filing to the following parties listed below:

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